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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1946**

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# No. 456

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ALFRED HANS WEISS,

*Petitioner,*

*vs.*

JOHN W. HOOD, WARDEN,

*Respondent.*

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**RESPONDENT'S SUGGESTION AS TO WHY JURISDICTION SHOULD NOT BE ASSUMED BY THE SUPREME COURT OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.**

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EUGENE COOK,
*Attorney General of Georgia;*
DANIEL DUKE,
*Assistant Attorney General of Ga.,*
*Counsel for Respondent.*

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*To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:*

## I. Statement of the Case

Alfred Hans Weiss was indicted by a Grand Jury in the Superior Court of Cobb County, Georgia, for the offense of murder on April 25, 1944. On May 8, 1944 he was arraigned for trial, entered a plea of not guilty, was tried by a jury in the Superior Court of Cobb County, Georgia, and was on May 8, 1944 found guilty of murder with a

recommendation to the mercy of the Court. He was sentenced by the Judge presiding to be confined at hard labor in the penitentiary for and during his natural life. The petitioner did not file a motion for a new trial, but began serving the sentence imposed upon him by the trial court. After entering upon the serving of the sentence and without ever having availed himself of the procedure for correcting any alleged errors that might have been committed upon the trial of the case, and after the time allowed by law for correcting any such errors, the petitioner brought a petition for Habeas Corpus against the warden of the prison in which he was serving, alleging that his detention was illegal and unlawful. The writ of Habeas Corpus came on for hearing December 15, 1945 and was continued until January 5, 1946, at which time both the petitioner and the respondent introduced evidence. After hearing the evidence of both sides, the Court denied the writ of habeas corpus and remanded the petitioner to the custody of the respondent. To the trial Court's order denying the writ, the petitioner filed a bill of exceptions and the case was reviewed by the Supreme Court of the State of Georgia. The judgment of the lower Court was affirmed. The petitioner has now filed a petition for a writ of certiorari based on constitutional grounds wherein he asks this Court to review the judgment of the State Supreme Court.

## II. The Questions Involved

The petitioner seeks to have this Court review the decision of the Supreme Court of Georgia and to reverse the same because certain alleged violations of rights which he contends are secured to him by the Constitution of the State of Georgia were committed during the process of his trial.

He claims that he was not afforded a trial by jury as required by the Constitution of the State of Georgia in

Article VI, Section XVII, Paragraph 1, and that because his trial proceeded with only eleven jurors, to which he contends he did not expressly consent. He claims this operated to deny him "due process" as provided for in Article I, Section I, Paragraph 3, of the Constitution of Georgia. He also contends that because he was convicted by a jury composed of only eleven jurors, he has been denied "equal protection of the laws" as provided for in Article I, Section I, Paragraph 2, of the Constitution of the State of Georgia.

The petitioner also contends that the Superior Court of Cobb County, Georgia, had no jurisdiction over the person of the petitioner or over the crime for which he was tried, convicted, and sentenced. He grounds this contention upon the premise that the evidence adduced upon his trial failed to show that the crime was committed in Cobb County, Georgia, and for that reason claims that he has been denied the protection secured to him in Article VI, Section XVI, Paragraph 6, of the Constitution of the State of Georgia.

The respondent contends that the 14th Amendment of the United States Constitution does not guarantee a person the right of having errors, which were allegedly committed during the trial of his case and which could have been tested by appeal, writ of error, or other remedial procedure, reviewed, where such alleged errors are raised for the first time in a writ of Habeas Corpus, unless it is apparent upon the face of the record that there has been a substantial departure from the commonly accepted mode of justice that has resulted in a miscarriage of justice.

The respondent further contends that the facts upon which the petitioner relies were open for consideration and review on appeal, but that he did not avail himself of the provisions of Georgia law governing appeals in criminal cases, and that he now seeks to use the writ of Habeas Corpus as a means of testing the validity of his conviction. The petitioner's conviction was not secured in disregard

of his constitutional rights and the writ of Habeas Corpus was not the only effective means of preserving his rights.

The respondent further contends that the petitioner made an intelligent, competent, and self protecting waiver of the one juror and went to trial with eleven jurors and that the circumstances of the case amply corroborate the testimony of his attorneys that such waiver was made.

The respondent further contends that nowhere in the record has the petitioner carried the burden of showing essential unfairness resulting from his waiver of the one juror, but on the contrary, the record shows that, in the circumstances, it would have been unjust for the Court to have refused to permit him to go on trial with eleven jurors.

The respondent contends that where State law amply provides procedure for testing the sufficiency of evidence on the question of venue, and for reviewing errors of procedure occurring on or preliminary to a trial that one who has not availed himself of this procedure cannot invoke the writ of Habeas Corpus as a substitute for an appeal, writ of error, or other revisory remedy for the correction of errors of law or fact in the absence of exceptional circumstances.

## III. Brief and Citations of Authorities in Support of Respondent's Suggestions That Jurisdiction Should Not Be Assumed by the Supreme Court of the United States.

Respondent respectfully urges that none of the questions raised by the petitioner are such that this Court should take jurisdiction of the case, because the grounds complained of are devoid of merit.

The facts disclosed by the record will show that the petitioner was indicted, tried, and convicted in Cobb County, Georgia, for the offense of murder. He was represented by two able local counsel and one attorney from his native

State of North Carolina. The verdict of guilty was found by a jury composed of eleven jurors. The evidence submitted by the State on the question of venue is admittedly weak, but we insist that it is sufficient under Georgia law. It is further insisted that even if there had been no evidence as to venue that this procedural insufficiency could not now be raised by the petitioner because he failed to file a motion for a new trial as is provided by Georgia Law and found in Code Section 6-1609 of the Code of 1933, and is as follows:

> "No judgement of a trial Court in a criminal case shall be reversed by either the Supreme Court or the Court of Appeals for lack of proof of venue or of the time of the commission of the offense, save where the particular point has been raised by a ground of the original or amended motion for a new trial."

After conviction, the petitioner entered upon the serving of his sentence. After the time provided by law in which he could have brought a motion for a new trial had elapsed, he sued out a writ of Habeas Corpus in which we insist he raised matters of error committed, during his trial, that should have been raised either by appeal, writ of error, or other revisory remedy.

He claims that he did not expressly consent to his case being tried by eleven jurors and that venue was not adequately proved. The testimony of both his attorneys, of the State attorney, and of others in the Court at the time shows that the defendant (the petitioner herein) had accepted eleven of the jurors that had been placed upon him. Both the petitioner and the State had exhausted their strikes and there was no qualified panel of jurors from which to select the twelfth juror. His attorneys knew of the hazardous position in which the petitioner would be if he accepted the first qualified juror from a new panel drawn suddenly by the Court. The attorneys discussed the matter in his

presence so they state and advised with him about it, then conferred with the State's attorney, and after hearing his approval, asked the Court that they be permitted to waive the twelfth juror and proceed to trial with the eleven already selected. The Court granted the request.

The *Patton* case relied upon by the petitioner held that a defendant represented by counsel might waive under certain circumstances trial by a jury of twelve and submit to trial by a jury of only eleven. The circumstances disclosed by the record in this case show to a demonstrable reality that the petitioner would have been in a hazardous position if the trial court had refused to permit him to submit to a trial of only eleven jurors. He would have, since both the State and the petitioner had exhausted their strikes and since there was no panel left from which to draw the twelfth juror, been forced to accept the first qualified juror drawn into Court by the presiding Judge. His attorneys were totally unprepared for such an eventuality. There was no way they could have intelligently prepared for it. The twelfth juror easily could have been a person who could have, while meeting all requirements as a juror, been unacceptable from the viewpoint of the petitioner. But, being in the position he was in, he elected to stand trial with eleven jurors rather than have the Court summon additional jurors, the first of whom he would have been compelled to accept. If there are any circumstances under which one accused of a crime might waive his right to a trial by twelve jurors and submit to a trial by eleven, I can conceive of no stronger circumstances that those borne out by the record in this case. If the Court had refused the request made upon it by both the attorneys for the petitioner and the attorneys for the State and forced the petitioner to select the twelfth juror from among those it would have summoned, such action on the part of the Court would have been tantamount to the Judge himself selecting the twelfth

juror. Had this been done, it would have raised a nice question of Constitutional Law under the 14th Amendment.

The petitioner made an intelligent waiver of a trial by twelve jurors and elected to be tried by a jury of eleven. See

*Patton* v. *U. S.*, 281 U. S. 276;
*Coates* v. *Lawrence*, 46 Fed. Sup. 414, 131 Fed. 2nd 110;
*Summons* v. *U. S.*, 119 Fed. 2nd 539;
*Adams* v. *U. S. ex rel. McCann*, 316 U. S. 655.

The essential features of trial by jury have not been disturbed in this case and the petitioner has been afforded every opportunity for a fair and impartial trial. See

*Caballero* v. *Halspeth*, 114 Fed. 2nd 545;
*Coates* v. *Lawrence*, 318 U. S. 759.

A defendant's waiver of a trial by a jury or of a trial by a lesser number than twelve jurors need not be in writing. See *Irvin* v. *Zerbst*, 97 Fed. 2nd 257; Certiorari denied in 305 U. S. 597.

The 14th Amendment of the United States Constitution does not guarantee that all criminal trials in State Courts must be by a jury and does not guarantee any particular form or method of procedure in the State Courts. The corrective process supplied by the State for correcting errors is adequate and since the petitioner has not attempted to avail himself of this process, the writ of Habeas Corpus ought not to have been allowed in this case. See

*Moore* v. *Dempsey*, 261 U. S. 86.

The Court stated in the case of

*Carruthers* v. *Reed*, 102 Fed. 2nd 933,

> "Where parties, even in criminal cases, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time, after a decision has

> been rendered adverse to them, to obtain a retrial, according to procedure which they have voluntarily discarded and waived • • • They could not deliberately withhold their application for such procedure and then be heard after conviction to assert on Habeas Corpus that their conviction was void."

In Georgia, one may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest. See

Georgia Code 1933, Section 102-106;

*Coates* v. *Lawrence,* 193 Ga. 379;

*Raleigh & Gaston R. R. Co.* v. *Bradshaw,* 113 Ga. 862 (2).

The petitioner is asking this Court to grant a writ of certiorari in this case because of what he contends to be a lack of jurisdiction in the Superior Court of Cobb County, Georgia, the Court in which he was tried and convicted.

The jurisdiction of the Superior Courts of Georgia is provided for in the State Constitution at Section 2-3201 of the Code of 1933, and is as follows:

> "The Superior Court shall have exclusive jurisdiction in cases of divorce; *in criminal cases where the offender is subject to loss of life, or confinement in the penitentiary* • • •"

The petitioner was indicted for murder under which indictment, if convicted, he could have been subject to loss of life or confinement in the peniteniary. Proof that the offense for which one is indicted was committed in the county where the indictment was returned is necessary to establish venue. Venue is a matter that can be waived and, under certain circumstances, one who has been convicted may be estopped from claiming that there was no proof of venue upon the trial of his case.

The general jurisdiction of a Court over the subject matter cannot be waived. In this case, the Superior Court

has jurisdiction over the subject matter and we insist that the quantum of evidence introduced at the trial is sufficient under Georgia Law to have established venue, even if this matter had been raised by a motion for a new trial. The facts are that this petitioner did not utilize the procedure established by Georgia Law for testing before the appellate court the sufficiency of the evidence on the question of venue.

It was held in the case of

*Luther Brown* v. *State of Indiana,* 37 N. E. 2nd. 73,

> "The right guaranteed by the State Constitution to a trial in the county where the offense was committed relates to the venue rather than to the jurisdiction, and may be waived by failure to make the objection at or before trial preventing raising of the question on appeal.
>
> "It is insisted that the type of jurisdiction which a party cannot confer by consent is that a court shall exercise its general jurisdiction over the subject matter which is not conferred upon the court by the Constitution or a valid statute."

It cannot be argued in this case that the Superior Court of Cobb County did not have general jurisdiction of the subject matter.

The petitioner was tried by a court which by the Constitution and statutes of Georgia had jurisdiction of the crime for which he was indicted. He has not raised preliminary to or during the trial any question as to the Court's jurisdiction. He did not after conviction make a motion for a new trial as is required in Code Section 6-1609 of the Georgia Code of 1933, *supra,* touching the question of "lack of proof of venue." After the time had expired to utilizing the procedure set forth in Georgia Law for questioning the proof of venue on his trial, he now seeks to use the writ of Habeas Corpus for correcting what at most is a mere error

of law which could have been corrected by another appropriate remedy.

The Courts have uniformly taken the view that an accused's right as to the place of trial, arising under a constitutional provision expressly granting or guaranteeing to persons accused of crime the right to be tried in, or by a jury of the county or district in which the offense was committed or is alleged to have been committed, may be waived.

*State* v. *Albee,* 61 N. H. 423;
*Dula* v. *State,* 292 Tenn. 669, 166 U. S. 638;
*King* v. *State,* 16 Ala. App. 341.

The fact that no motion for a new trial was ever made by the petitioner and that he raised no objections during the process of his trial nor at the conclusion of the State's evidence at his trial amply warranted the Court in holding upon the hearing of the petition for writ of Habeas Corpus that he waived proof of venue by the State. In addition, the Court hearing his application for a writ of Habeas Corpus was authorized to hold that he is now estopped to raise this question.

The Court stated in the case of

*Brown* v. *State,* 123 Ga. 502,

> "Failure to establish venue may be taken advantage of under a general assignment of error that the verdict is contrary to law and evidence, though no question on that subject was raised below."

The Supreme Court of Georgia made this ruling at the March Term of 1905 prior to the passage of Section 6-1609, *supra,* which was passed August 21, 1911, and found in Georgia Acts of 1911 at page 149.

At the October Term in 1914, the Supreme Court held in the case of

*Marshman* v. *State,* 138 Ga. 864 (2),

> "In an act to regulate and prescribe certain matters of review procedure and practice in the courts of this State, it is declared that no judgment of a trial court in a criminal case shall be reversed by the Supreme Court or the Court of Appeals for lack of proof of venue, save where the particular point has been specifically raised by a ground of the original or amended motion for a new trial. In the present case, the particular point that there was no proof of venue of the crime alleged to have been committed, was not raised by any ground to the original or amended motion."

The judgment of the Court below was affirmed.

Both the Supreme Court of Georgia and the Court of Appeals have uniformly followed this practice since the ruling in the *Marshman* case, *supra.* See

*Fox* v. *State,* 150 Ga. 673;
*Shirley* v. *State,* 32 Ga. App. 780;
*Miller* v. *State,* 51 Ga. App. 263.

While not taking the position that this Court can now examine the record to determine whether there was sufficient evidence to establish venue, and strongly insisting that venue is a matter to be determined by the Georgia Courts and by the procedure provided by Georgia Law, this Court's attention is called to the testimony of Grady Holcombe, at pages 13 and 14 of the transcript of the record, and to the testimony of C. L. Heath at pages 15, 16, 17, 18, and 19, which we contend amply prove venue. See

*Dumas* v. *State,* 62 Ga. 58;
*Womble* v. *State,* 107 Ga. 666;
*Wardlow* v. *State,* 66 Ga. App. 575;
*Martin* v. *State,* 193 Ga. 824.

It is urged that the petitioner waived all questions that are raised as to venue when he failed to file a motion for a new trial, accepted the verdict of the jury, and the judgment of the Court and began serving his sentence. See *Swain* v. *State*, 162 Ga. 777 (6).

The fact that the petitioner has elected to begin serving his sentence and is now seeking his release by means of Habeas Corpus, upon points which he could have raised by appropriate action in appeal, certainly authorizes the implication that he elected to take his chances, rather than face the consequences of another trial should he, by means of a proper appeal, have been granted a new trial. In Georgia, citing the *Swain* case, *supra*,

> "One accused of crime may at his option waive any right guaranteed him by law."

It is insisted that all of the matters complained of by the petitioner are matters of criminal procedure within the authority of the State to adopt and that they violate no provisions of the Constitution of the United States.

The petitioner is somewhat skeptical of the propositions upon which he bases his rights to have this Court grant certiorari for he predicates his contentions upon the ground that his attorneys abandoned him and that now, his only remedy is by a writ of Habeas Corpus.

His attorneys were not appointed by the Court, but were selected by him. In addition to the two local attorneys, he was represented by an attorney from his native State of North Carolina. Nowhere does this petitioner claim that the State of Georgia has by the method of his trial or by any law that operated against him been responsible for his not availing himself of the elaborate procedure provided in Georgia Law for correcting alleged errors transpiring upon the trial of criminal cases. His contention

is that since *his attorneys* did not file a motion for a new trial that he should now be permitted to use Habeas Corpus as a substitute for a writ of error. We do not think this is a tenable position. To permit such a perversion of the ancient writ of Habeas Corpus would be to encourage persons convicted of crime to plant "sleeper errors" in the record and await the time when they could not bring a motion for a new trial, and then go by way of a petition for a writ of Habeas Corpus to gain their immediate freedom. By this means, they could avoid the uncertainties of a second trial.

For the above and foregoing reasons, it is suggested that jurisdiction by this Court should not be assumed.

EUGENE COOK,
*Attorney General of Georgia;*
DANIEL DUKE,
*Ass't. Attorney General.*

Addresses:
201 State Capitol,
Atlanta, Georgia.

STATE OF GEORGIA,
County of Fulton:

I, Eugene Cook, Attorney General of the State of Georgia, do certify that I have this day served a copy of the within response upon counsel for petitioner, by mailing a copy of the same to Honorables Paul Crutchfield and James R. Venable at their respective addresses, Volunteer Building, Atlanta, Georgia, and Brown Building, Atlanta, Georgia.

This 25 day of September, 1946.

EUGENE COOK,
*Attorney General of Georgia.*